



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Asbestos Management Services
File: B-236379
Date: August 25, 1989

DIGEST

1. Protest filed after bid opening contending that insufficient time existed to permit compliance with amended bid guarantee requirement is untimely since the protester should have raised the matter prior to bid opening.
2. Bid that did not contain a bid guarantee in the form required by the solicitation was properly found to be nonresponsive; proper bid guarantee may not be substituted after bid opening.

DECISION

Asbestos Management Services (AMS) protests the rejection of its bid under invitation for bids (IFB) No. DABT39-89-B-0030, issued by the Army for the removal of asbestos at Fort Sill, Oklahoma. AMS' bid was rejected because that firm submitted, contrary to the IFB as amended, an irrevocable letter of credit as its bid guarantee. AMS contends that after the original bid guarantee provision was deleted by an amendment to the IFB insufficient time was allowed prior to bid opening to permit compliance with the new guarantee requirement. It further argues that, since the agency would obtain substantial savings by accepting AMS' bid and because the contracting officer advised AMS that it was the apparent low bidder, it should be permitted to correct the form of its bid guarantee so as to comply with the IFB requirements.

We dismiss the protest.

The IFB, as originally issued on February 10, 1989, permitted the submission of an irrevocable letter of credit as a bid guarantee. By amendment No. 0006 the agency incorporated a different bid guarantee clause which did not permit the use of irrevocable letters of credit. The amendment changed the bid opening date to June 30; the

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protester received the amendment on June 19. Notwithstanding the changed requirement, the protester submitted an irrevocable letter of credit as its bid guarantee. The bid was subsequently rejected as unacceptable.

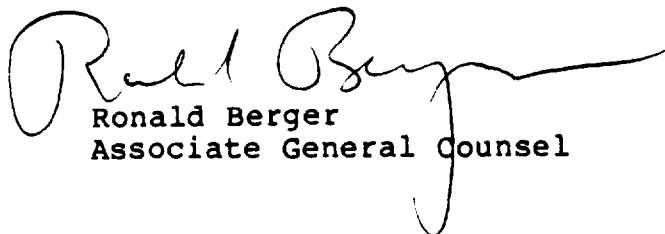
To the extent the protester complains that amendment No. 0006 did not give it sufficient time to change its bid guarantee the protest is untimely and will not be considered. Our Bid Protest Regulations require protests based on alleged improprieties in a solicitation which are apparent prior to bid opening to be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (1988). Although AMS received amendment No. 0006 several days prior to the amended bid opening date, it did not protest the alleged lack of time either to the contracting agency or our Office until after bid opening. We therefore will not consider this issue. AJM Custom Built Inc., B-234110, Mar. 16, 1989, 89-1 CPD ¶ 283.

As for AMS' argument that it should have been permitted to substitute another form of bid guarantee for its letter of credit after bid opening, we disagree. Failure to furnish a bid guarantee in accordance with the solicitation's terms requires the rejection of the bid as nonresponsive. McLemore Pump, Inc., B-230031, Jan. 21, 1988, 88-1 CPD ¶ 83. Substituting an acceptable form of bid guarantee after bid opening for an unacceptable one is not permitted since a nonresponsive bid cannot be made responsive by action taken after bid opening. G&G Steel, Inc., B-225750, Apr. 1, 1987, 87-2 CPD ¶ 54. Noncompliance with a bid guarantee requirement may be waived only under those limited conditions specified in Federal Acquisition Regulation § 28.101, none of which is present here.

In addition, the fact that AMS was told that it was the apparent low bidder and that it took the agency more than 2 weeks to reject AMS' bid as nonresponsive does not alter the situation. An agency's failure to reject a bid as nonresponsive immediately at the time of bid opening does not constitute a waiver of the bidder's failure to provide a proper bid guarantee or estop the agency from rejecting the bid later after the bid has been determined to be nonresponsive. Darla Env'tl., Inc., B-234560, May 12, 1989, 89-1 CPD ¶ 454. Finally, the possibility that the agency might realize monetary savings by waiving a material deviation in a bid cannot affect the question of responsiveness inasmuch

as any savings cannot outweigh the importance of maintaining the integrity of the competitive bidding system by rejecting nonresponsive bids. HoseCo, Inc., B-226420, Mar. 12, 1987, 87-1 CPD ¶ 282.

The protest is dismissed.



Ronald Berger
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